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No. 82-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHIRLEY STOVER, *et al.*,

Petitioners,

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CROWN CENTER REDEVELOPMENT CORPORATION AND HALLMARK CARDS, INCORPORATED IN OPPOSITION

ROBERT L. DRISCOLL
LAWRENCE M. BERKOWITZ

Stinson, Mag & Fizzell
2100 CharterBank Center
P.O. Box 19251
Kansas City, Mo. 64141
(816) 842-8600

ROBERT J. SISK
JOHN M. TOWNSEND
RONALD A. STERN*
GEOFFREY F. ARONOW

Hughes Hubbard & Reed
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

JUDITH C. WHITTAKER
P.O. Box 126
Kansas City, Mo. 64141
(816) 274-4052

Attorneys for Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated

*Counsel of Record

PARRISH PRESS, WASHINGTON—1001 N. OAK STREET, ARLINGTON, VA. 22209—(703) 522-0322

QUESTIONS PRESENTED

1. Whether an order certifying a class action under Fed. R. Civ. P. 23(b)(1) that prohibits class members from entering into comprehensive individual settlements of their pending personal injury and wrongful death actions is an injunction appealable under 28 U.S.C. § 1292(a)(1).

2. Whether a federal court order certifying a mandatory class action under Rule 23(b)(1) and prohibiting the individual settlement of actions previously initiated in state court by individual class members violates the Anti-Injunction Act, 28 U.S.C. § 2283.*

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* Although respondents oppose the petition in this case, they are filing a conditional cross-petition that would present related questions.

LIST OF PARTIES

Parties to the proceedings in the United States Court of Appeals for the Eighth Circuit, Nos. 82-1181 and 82-1207 (consolidated), were: Shirley Stover, a representative of the federal plaintiff class; the Honorable Scott O. Wright, United States District Judge for the Western District of Missouri; Jacqueline N. Rau; Melanie Hanson Johnson and Gerard Stanley Johnson, representing those members of the class who have individual actions pending in the Missouri state courts; Crown Center Redevelopment Corporation; Hallmark Cards, Incorporated; Hyatt Corporation; Eldridge & Son Construction Co., Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; PBNDML Architects Planners, Inc.; and Smith & Boucher, Inc.*

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* Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated participated in the proceedings in the Eighth Circuit as respondents, not as *amici curiae*. *See* p.1 n.1, *infra*.

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BRIEF FOR RESPONDENTS CROWN CENTER REDEVELOPMENT CORPORATION AND HALLMARK CARDS, INCORPORATED IN OPPOSITION

Respondents Crown Center Redevelopment Corporation ("Crown Center") and Hallmark Cards, Incorporated ("Hallmark")[1] oppose the granting of the

[1] Both petitioner and the court of appeals inaccurately refer to Crown Center and Hallmark as *amici curiae*. Crown Center and Hallmark participated actively as respondents in the proceedings in the court below. *See* Fed. R. App. P. 21(b). Under Rule 19.6 of this Court, Crown Center and Hallmark are also respondents in this Court and thus are parties to this proceeding.

(footnote continues)

petition for a writ of certiorari filed by Shirley Stover to review an interlocutory decision of the United States Court of Appeals for the Eighth Circuit.[2]

STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit vacating the certification of a class action under Fed. R. Civ. P. 23(b)(1) by the United States District Court for the Western District of Missouri. The Eighth Circuit held that the district court's class action order, which expressly prohibited the comprehensive settlement of numerous actions previously filed by class members in state court, violated the Anti-Injunction Act's prohibition against federal court orders enjoining state court proceedings.

The Eighth Circuit's decision does not merit review by this Court since it is not in conflict with the decision of any other court of appeals and does not conflict with any decision of this Court. The decision, which is consistent in its result with a recent decision of the Ninth Circuit

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(footnote continued)

Pursuant to Rule 28.1 of this Court, respondents state that Crown Center is a wholly-owned subsidiary of Hallmark, with no subsidiaries or affiliates except wholly-owned subsidiaries, and that Hallmark is a privately-held corporation with no parent company. Hallmark's only subsidiary, other than wholly-owned subsidiaries, is Grupo H. d M, S.A. de C.V., a Mexican company.

[2] Counsel for the following defendants in the various state and federal skywalk cases have asked that we inform the Court that their clients join in the views set forth in this brief in opposition: Concordia Project Management Ltd.; Eldridge & Son Construction Co., Inc.; General Testing Laboratories, Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; H&R Inspection Service, Inc.; Hyatt Corp.; Marshall & Brown, Incorporated; Midwest Mechanical Contractors, Inc.; National Fire Sprinkler Corp.; PBNDML Architects Planners, Inc.; and Seiden & Page, Inc.

vacating a similar Rule 23(b)(1) class action,[3] is based on the Eighth Circuit's interpretation of the unusual certification order entered by the district court. The fact-specific nature of the court of appeals' ruling renders further review inappropriate. Review should also be denied since it would unnecessarily delay the disposition, either by settlement or by trial, of the claims asserted by the victims of the collapse.

1. The collapse of two skywalks at the Hyatt Regency Hotel in Kansas City on July 17, 1981 was followed by the filing of numerous personal injury and wrongful death actions. Of the approximately 150 cases brought within six months of the collapse, all but 18 were filed in the Circuit Court of Jackson County, Missouri. The few cases not brought in Missouri state court were filed in the United States District Court for the Western District of Missouri. The flood of lawsuits generated by the collapse initially proceeded expeditiously, with individual cases consolidated for pretrial discovery which was coordinated in the state and federal courts. Prior to the federal court's certification of a class action in January 1982, more than 120 bodily injury and wrongful death claims had been settled through the payment of more than $18 million to compensate victims and their families. *See* Affidavit of Michael E. Waldeck, dated March 4, 1982 (Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 50).

2. In October 1981, after numerous individual state and federal court cases had been filed, a single plaintiff, Molly Riley, moved in federal district court for certification of a class action. One hundred seventy-five potential class members with claims arising from the accident filed

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[3] *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 through 81-4656 (9th Cir. June 18, 1982, as amended, July 15, 1982).

affidavits in opposition to the class certification motion. *See* Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 73.

On January 25, 1982, the federal court certified a mandatory class action under Rule 23(b)(1). The court certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages and under Rule 23(b)(1)(B) on the issues of liability for, and amount of, punitive damages. Pet. App. 50a-55a. The procedures followed by the district court in certifying the class action were unorthodox and improper.[4]

While the district court stated that settlements of "actual damages" could continue, it prohibited class members from settling their punitive damage claims. *See* Pet. App. 9a. The court stated that "claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues." Pet. App. 60a. The practical effect of the district court's order was to prohibit settlement of any claims, because parties to litigation compromise and settle claims to obtain "a final determination of the controversy

[4] The federal court denied plaintiff Riley's motion for class certification on the ground that she had "failed to join certain parties who are needed for a just adjudication." Pet. App. 42a, 61a. After rejecting as a class representative the only plaintiff who had sought class action treatment, the district judge took the extraordinary step of commencing his own "search of court records in order to determine which federal court plaintiffs could serve as representatives of the class." Pet. App. 43a. Without prior notice to the parties or an opportunity for them to address the critical question of adequacy of representation, the court *sua sponte* certified a class action and named four plaintiffs, including Mrs. Stover, as class representatives. Pet. App. 43a, 61a. Soon after the court issued its class certification order, it was discovered that two of the named plaintiffs selected by the federal judge lacked the necessary diversity of citizenship and that a third had already settled his claim. Petitioner Stover thus remained as the only representative of the plaintiff class.

between them." *Restatement of Restitution*, § 11, Comment c (1937). Predictably, the settlement process was halted by the district court's order and no additional claims were settled until the class certification was vacated by the Eighth Circuit.

3. The district court refused to certify its class action order for interlocutory appeal under 28 U.S.C. § 1292(b). Therefore, both a petition for mandamus and an appeal under 28 U.S.C. § 1292(a)(1) were filed by individual members of the class who objected to the certification. The court of appeals consolidated these cases and, on June 7, 1982, vacated the class certification order.

The Eighth Circuit found that, "contrary to the class's assertion, the district court expressly prohibited class members from settling their punitive damage claims." Pet. App. 9a. As a result, the court of appeals concluded "on the facts before us" that the "substantial effect of the order" was injunctive in character and that the order therefore was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. 8a-9a. The Eighth Circuit held that the class certification order violated the Anti-Injunction Act, 28 U.S.C. § 2283, because the order prevented the settlement and prosecution of a large number of actions pending in state court that had been filed by individual class members. It held that the only exception to the Act invoked by the class—the exception for injunctions necessary in aid of the federal court's jurisdiction—did not apply on the facts of this case. Pet. App. 12a-15a. In vacating the class certification order, the majority rested exclusively on the Anti-Injunction Act and did not address the propriety of the district court's certification of a mandatory class action under Rule 23(b)(1).

Judge Heaney, in his dissent, agreed that the "district court's class certification order expressly prohibits class members from settling their punitive damage claims" and

thus constituted an "express injunction." Pet. App. 19a n.1; 34a n.16. He departed from the majority in concluding that, if modified to delete the prohibition against settlements, the inherent restrictive effects of the order certifying a mandatory class action would come within the exception to the Anti-Injunction Act for injunctions necessary in aid of the federal court's jurisdiction. Pet. App. 33a-37a & nn.16-17.

4. Since the filing of the petition on August 6, 1982, there have been several important developments in the skywalk cases.

a. On September 17, 1982, the district court rejected petitioner's July 1, 1982, motion to certify a modified Rule 23(b)(1) class action and petitioner's August 30, 1982, motion to certify a Rule 23(b)(3) class action. *See* Appendix A, 5a-6a (the district court's September 17, 1982, order and memorandum is reprinted as Appendix A to this brief). The district judge explained that he was denying these motions in part because he had been advised that petitioner Stover and her children had entered into a settlement of their claims and, as a result, there no longer was a plaintiff with complete diversity as to each of the defendants that was willing to serve as class representative. *Id.*, 6a. The court also declined to certify any type of class action because "few victims have come forward in support" of a class action. *Id.*[5] Instead, the

[5] The petitioner had asked the district court to certify a class action under Rule 23(b)(1), which would include all business invitees present in the hotel lobby at the time of the skywalk collapse who had not yet filed individual suits in state court. The court declined to certify such a modified (b)(1) class action in part because membership in the class would be "governed by the fortuitous circumstance of having rushed to a courthouse to file suit." Appendix A, 5a.

district court ordered the cases pending before it consolidated for trial and set a January 10, 1983, trial date.

b. On September 22, 1982, a Utah resident filed a complaint in United States District Court for the Western District of Missouri asserting claims based on the July 17, 1981, collapse of the skywalks and moved for reconsideration of the district court's September 17, 1982, order denying certification of either a modified Rule 23(b)(1) class action or a Rule 23(b)(3) class action. The district court has not yet ruled on this motion.

c. On September 9, 1982, the numerous skywalk cases pending in the Circuit Court of Jackson County, Missouri, were ordered consolidated for trial on the issues of liability for compensatory and punitive damages. The state court ordered that the consolidated trial will commence on March 14, 1983. This order is reprinted as Appendix B to this brief.

5. In response to a request from respondent Rau, the Court extended the time for the filing of responses to the petition to and including October 7, 1982.

ARGUMENT

1. Petitioner has failed to demonstrate any "special and important reasons" making this case worthy of review by this Court. Supreme Court Rule 17.1. There is no claim that the decision of the Eighth Circuit is in conflict with the decision of any other federal court of appeals on the same issue. To the contrary, both the Eighth Circuit in the decision below and the Ninth Circuit in the recent *Dalkon Shield* case have rejected attempts by district judges to transform mass tort cases into mandatory Rule 23(b)(1) class actions based on the assertion of multiple claims for punitive damages. *See In re Northern District of California, Dalkon Shield IUD Products Liability Litigation,* Nos. 81-4648 through 81-4656 (9th Cir. June 18,

1982, as amended, July 15, 1982). Significantly, the district court decision in this case and the *Dalkon Shield* decision recently reversed by the Ninth Circuit are the only cases in the 16-year history of the modern federal class action rule that have espoused such an extraordinary interpretation of Rule 23(b)(1).

Nor is the decision below "inconsistent with the reasoning" of this Court's decisions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). *See* Pet. 8-9. The Court in the *Coopers & Lybrand* case held that the denial of a request for class certification is not a "final decision" appealable under 28 U.S.C. § 1291. 437 U.S. at 464-65. In *Gardner*, the Court held that the denial of the class certification motion in that case "did not pass on the legal sufficiency of any claims for injunctive relief" and therefore was not appealable under 28 U.S.C. § 1292(a)(1). 437 U.S. at 480-81. Here, by contrast, all three members of the Eighth Circuit panel found that the district court's order certifying a class action constituted an "express injunction" against the settlement of previously filed claims and therefore was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. 34a n.16; *see* Pet. App. 8a-9a. Rather than acting in conflict with decisions of this Court, the Eighth Circuit followed this Court's ruling in *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188, 192 (1942), that in determining whether an order is an injunction a court should look "to the substantial effect of the order made" rather than "the terminology used." Pet. App. 9a.

2. The fact-specific nature of the Eighth Circuit's Anti-Injunction Act ruling renders it inappropriate for further review by this Court. The Eighth Circuit's decision turns in large part on the panel's assessment of the specific order entered by the district court. The majority repeatedly noted that it disagreed with the "characterization" of the order by the class and stated that its ruling was based

on its assessment of "the facts before us." Pet. App. 8a, 9a, 18a. In particular, the majority focused on the portion of the certification order prohibiting class members from settling their punitive damage claims. Pet. App. 8a-9a. As the dissenting judge recognized, the "majority decision is very narrow." Pet. App. 19a.

3. The interlocutory nature of the Eighth Circuit's decision provides another important reason for denying the petition. This Court has stated on numerous occasions that it "above all others must limit its review of interlocutory orders," *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), and that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). A writ of certiorari should not be issued "to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372, 384 (1892). No such extraordinary situation is presented here.

4. The decision of the Eighth Circuit also does not merit review since the judgment vacating the district court's certification of a Rule 23(b)(1) class action was clearly correct. Although the Eighth Circuit majority did not reach the question of the propriety of the Rule 23(b)(1) class certification, the district court improperly invoked this type of class action. In these circumstances, review of the particular rationale relied upon by the Eighth Circuit would be an abstract and wholly unnecessary exercise.[6]

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[6] The impropriety of the district court's certification of a Rule 23(b)(1) class action in these cases is discussed in the conditional cross-petition for a writ of certiorari (pp. 11-15) that is being filed by Crown Center and Hallmark contemporaneously with this brief.

5. There are important practical and policy considerations that support the denial of the petition for a writ of certiorari in this case.

a. Further review by this Court will inevitably delay the resolution of these personal injury and wrongful death cases. As noted previously, prior to the entry of the January 25, 1982, class certification order more than 120 claims had been settled. Settlements resolving approximately 55 additional claims have been entered into since the Eighth Circuit removed the barrier to settlements erected by the district court's order. As this Court has long recognized, "compromises of disputed claims are favored by the courts." *Williams v. First National Bank*, 216 U.S. 582, 595 (1910). Granting the petition is not in the public interest because it would likely again disrupt the process of settlement and compromise of claims.

Moreover, granting of the petition might also delay the trial of cases that are not settled, since the federal and state courts might conclude that they should not proceed with trials until this Court's decision is handed down. Consolidated trials are now scheduled to commence in federal court on January 10, 1983, and in state court on March 14, 1983. Under these circumstances, the normal reluctance of the Court to review interlocutory orders is reinforced by the strong interests of the victims of the collapse in avoiding further delay of the resolution of their claims.

b. Important federalism considerations would also be served by a denial of the petition. Petitioner, through a mandatory federal class action, seeks to require that all the claims arising from the collapse of the skywalks be tried in federal court, despite the fact that all but a handful of the numerous cases brought by claimants have been filed in Missouri state court and that all of the claims are governed

by Missouri law.[7] The decision of the Eighth Circuit has the salutary effect of permitting these cases to proceed in the most appropriate forum and the forum selected by the vast majority of plaintiffs, the Missouri state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. DRISCOLL
LAWRENCE M. BERKOWITZ

Stinson, Mag & Fizzell
Kansas City, Missouri

ROBERT J. SISK
JOHN M. TOWNSEND
RONALD A. STERN
GEOFFREY F. ARONOW

Hughes Hubbard & Reed
Washington, D.C.

JUDITH C. WHITTAKER

Kansas City, Missouri

Attorneys for Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated

October 1982.

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[7] At the time the class certification order was entered only 18 of the approximately 150 cases were pending in federal court. At present, only 6 individual cases remain in federal court.

APPENDICES

APPENDIX A

IN THE

United States District Court

FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 81-0945-A-CV-W-5

IN RE FEDERAL SKYWALK CASES

ORDER AND MEMORANDUM

This action concerns the claims that have arisen out of the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri on July 17, 1981. On January 25, 1982, this Court certified a mandatory class action under Rule 23(b)(1) for the prosecution of three common issues arising from those claims. *See, In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). Those issues included liability for compensatory damages, liability for punitive damages, and amount of punitive damages. The mandatory class action was certified in order to protect the many victims of the Skywalk disaster from the spectre of insufficient funds to pay their damages,[1] to protect the defendants from the burden and

[1] The amount of damages claimed by those victims of the skywalk collapse who have filed suit exceeds 1.5 billion dollars. Though the actual value of those claims is probably less than the amount pled, the actual value clearly exceeds the ability of most defendants to pay. In fact, several defendants have stated in their responses to interrogatories that their net worth is minimal or negative, and insurance carriers contend that their policies with the defendants do not provide coverage for punishable acts. Since it could not be known which defendants, if any, would be held liable for

(footnote continues)

expense of litigating a multiplicity of suits,[2] to guarantee an equitable distribution of punitive damage monies, if

(footnote continued)

the disaster, it became apparent to the Court that the monies available to pay legitimate claims might be limited.

The Court's concern with respect to the ability of defendants to pay compensatory damages was put at ease when it was informed that approximately 150 million dollars had been committed to the settlement of those claims. No money was committed to pay punitive damage claims. In addition, the defendants contended that even if their acts were punishable, only one award of punitive damages was warranted. The Court observed that Missouri law was unclear on the multiple punitive damage award issue. If Missouri law provided for only a single award, then one punitive damage claimant would receive the whole award and would not be required to share it with other claimants. If Missouri law provides for multiple awards, then only the first few award winners could be assured of an award since the fund might be exhausted, the Court might put a limit on total amount recoverable, or each award might be remitted by the amount of previous awards. Under either circumstances, punitive damage claimants would not be treated fairly unless a mandatory class was used. The Court certified the mandatory class in order to provide an equitable result for all claimants.

[2] Approximately 150 suits had been filed in the Circuit Court of Jackson County, Missouri and in this Court. The majority of cases were filed in state court. Approximately 1,000 persons who were business invitees present in the hotel lobby at the time of the skywalks' collapse have not yet filed suit.

Several cases previously filed in this Court were voluntarily dismissed and refiled in state court soon after the appellate court decertified the mandatory class. Those persons who have continued to prosecute their claims in this Court have indicated that they intend to go to trial. Additionally, many cases are pending in state court. Though the parties to the state court action have asserted on many occasions that the parties have agreed to a single trial, no state court order has ever been entered requiring a single trial and no written agreement exists among the parties in state court providing for a single trial. Nor has any order been entered in state court which would prevent those victims who have not yet filed suit from later filing suit and trying their cases. The state court plaintiffs' assertion that there will be only one or very few trials in state court is wholly without support. Even though the defendants vigorously contend that there can only be one award of punitive damages, they have opposed every attempt by this Court to bring that contention to fruition. *See, State ex rel Young v. Crookham*, 618 P.2d 1268 (Ore. 1980) (Tanzer, J., concurring).

any, to all victims without regard to whether a particular victim was first to file and try his or her lawsuit,[3] to insulate those attorneys who represented more than one victim, or representative of a victim, from an actual conflict of interest under Disciplinary Rule 5-105 of the Missouri Code of Professional Conduct,[4] and to provide for an efficient and principled procedural vehicle for the speedy resolution of these cases. *See generally*, Comment, "The Use of Class Actions for Mass Accident Litigation," 23 Loyola L. Rev. 383 (1977); Note, "Mass Accident Class Actions," 60 Cal. L. Rev. 1615 (1972). The individual amount of compensatory damages recoverable by each class member was not to be determined by the class action.

On February 8, 1982, class members Melanie and Gerald Johnson filed a petition for a writ of mandamus in the Court of Appeals for the Eighth Circuit requesting the class action to be set aside and the disqualification of this

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[3] The mandatory class action was certified in order to guarantee that each victim would receive an equitable share of a single punitive damage award if the award was warranted. A victim's share could have been distributed in relation to the amount received for compensatory damage claims. *See e.g., State ex rel Young v. Crockham*, 618 P.2d 1268, 1269 n.2 (Ore. 1980). If multiple trials were conducted, each victim who was not the first to try his or her case might be faced with a culpable defendant whose assets were depleted or with the remittitur of the award based on prior awards.

[4] Disciplinary Rule 5-105 provides, in part, that an attorney must decline or discontinue the representation of multiple clients if the exercise of his independant professional judgment on behalf of the first client who has retained him could be adversely affected by the representation of another client. An attorney places himself in a conflicting position when he undertakes the representation of multiple clients who each have punitive damage claims which have arisen out of a common incident against a common defendant or defendants. The conflict arises because only one of an attorney's clients can be assured that his or her punitive damage award will not be undermined by an award won by another client.

Court.[5] Class member Jacqueline Rau then filed an interlocutory appeal and, in the alternative, a petition for a writ of mandamus. She requested similar relief. The appellate court rendered its decision on June 7, 1982, holding, two-to-one,[6] that the class certification order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1) and was barred by the Anti-Injunction Statute, 28 U.S.C. § 2283. *See In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). The majority ruled that the Anti-Injunction Act bars any mandatory class action where it is certified after a class member has filed an individual suit in state court. *Id.* at 1180. Though the majority did not question the need for a class action to address the vexing issues facing this Court in this litigation, it vacated the certification order without commenting on alternative means of resolving those vexing issues. *Id.* at 1184 n. 14. The dissent, on the other hand, suggested that this Court either slightly modify its mandatory Class action order or certify an opt-out Class action under Rule 23(b)(3). *Id.* at 1184 (Heaney, J., dissenting). By an equally divided vote, three-to-three,[7] the appellate court denied petitions for rehearing and rehearing *en banc*. The class unsuccessfully petitioned Justice Blackmum [sic] for recall and stay of the Eighth Circuit's mandate pending an application for a writ of certiorari to the Supreme Court. A petition for writ of certiorari is pending. *See, Stover v. Johnson*, No. 82-217 (August 6, 1982).

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[5] The panel unanimously agreed that there was no basis for disqualification. After the mandate of the appellate court became final, the plaintiffs-intervenors and the Hyatt Corporation again moved for disqualification based on many of the same reasons raised before. That motion was denied. In a recent memorandum filed by the Hyatt Corporation, on the issue of the propriety of a Rule 23(b)(3) class action, the Corporation again appears to be asking the Court to disqualify itself. *See*, note 8 *infra*.

[6] Judge Heaney dissented.

[7] Chief Judge Lay, Judge Heaney and Judge Bright voted to grant rehearing *en banc*. Judge John R. Gibson did not participate in the consideration of the petition.

After the mandate of the appellate court became final, a motion to certify a new mandatory class action was filed. The motion proposed that this Court, in order to be consistent with the majority holding of the appellate court, recertify the issues certified in January and then exclude from membership in the Class those victims who had filed suit in state court. Oral arguments were heard on that motion in August. During the arguments this Court voiced some reservation about recertifying a mandatory class action which permitted some victims, but not all victims, to circumvent membership. Though the narrow language of the appellate court decision seemingly sanctions a mandatory class which excludes from class membership those victims who have filed cases in state court, an order fashioning a new mandatory class in accordance with the directives of the appellate court majority would be unprincipled. This Court cannot, in good conscience, certify a mandatory class action where the membership of class is governed by the fortuitous circumstance of having rushed to a courthouse to file suit.

The Court, still faced with the same concerns which were not resolved by the appellate court opinion, issued a show cause order directing interested parties to brief the issue of whether or not a voluntary class action under Rule 23(b)(3) would be proper in light of the unfolding circumstances of this case.[8] The Court additionally ordered discovery to be completed by November, 1982, and

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[8] In its memorandum of August 23, 1982, in response to the show cause order, defendant Hyatt Corporation added a conclusory diatribe which was concerned generally with the "overloaded and overworked" federal court system and which inquired about why this Court would want to undertake a burden which it could easily ignore. To the extent that the Hyatt Corporation is asking this Court to leave those plaintiffs who have chosen a federal forum without a meaningful remedy or to cease handling diversity cases, no response is necessary. To the extent that its conclusion is a veiled motion to disqualify, the motion is denied.

set the trial of the skywalk collapse for January 10, 1983. After the show cause order issued, a motion was filed requesting the Court to certify a Rule 23(b)(3) class action. A hearing was held on September 13, 1982 to determine the propriety of a voluntary class action. From the arguments presented at that hearing, it became apparent that no person, whose citizenship was wholly diverse from all defendants, was willing to represent the Class.[9] The Court was informed that the prior representative, Mrs. Shirley Stover and her children, had settled their cases for a reported sum in excess of 10 million dollars just prior to the hearing. Discovery is presently being conducted for the purpose of ascertaining the propriety of the alleged settlement figure.

The Court is not now inclined to certify any class action where all defendants cannot be joined and where few victims have come forward in support of one. The Court will, therefore, consolidate the cases pending before it. They will be tried beginning on January 10, 1983. Though the defendants have opposed this Court's attempts to accommodate their contention that they can only be liable, if at all, for one punitive award, this Court, nonetheless, is inclined to find that only one punitive damage recovery,[10] reflecting the totality of any punishable conduct, will be permitted at a consolidated trial. That award could be divided among the consolidated plaintiffs.

The plaintiffs, who have filed in state court, have vigorously insisted that Missouri law permits undiminished multiple punitive damage awards. They may con-

[9] Approximately 54 wrongful death claims have not been filed or settled. The position of these claimants with respect to an opt-out class is not known.

[10] This includes any award for aggravating circumstances if a wrongful death claim is present.

tinue to press that contention in state court since the state court will be in a position to ultimately resolve the issue. After the state court has resolved the question, the state court's ruling would serve to guide this Court in any federal court cases which might be subsequently filed. If a plaintiff who has filed in state court and who has complete diversity with respect to the defendants is not assured that Missouri law provides for undiminished multiple punitive damage awards, that plaintiff may come forward and move for an opt-out class action as envisioned by the dissent of Judge Heaney or ask to have his or her case consolidated with cases in this Court.

Accordingly, it is hereby

ORDERED that the plaintiff's motions to certify a modified Rule 23(b)(1) or a Rule 23(b)(3) Class action are denied. It is further

ORDERED that the federal skywalk cases are consolidated for discovery and trial. It is further

ORDERED that consolidated discovery be completed by November 15, 1982.

It is further

ORDERED that all parties submit their proposed voir dire questions and jury instructions, exhibit and witness lists, and briefs on controverted matters by December 10, 1982. It is further

ORDERED that the consolidated trial will commence on January 10, 1983.

SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.
September 17, 1982.

APPENDIX B

IN THE

Circuit Court of Jackson County, Missouri

Case No. CV81-15244
MCF Civil Docket "I"

IN RE SKYWALK CASES

ORDER

Upon motion of Plaintiffs' Liaison Committee and for good cause shown,

IT IS HEREBY ORDERED that trial is set for March 14, 1983 for all personal injury and wrongful death actions arising out of the collapse of the skywalks at the Kansas City Hyatt Regency Hotel on July 17, 1981, which have been filed in the Circuit Court of Jackson County, Missouri.

IT IS FURTHER ORDERED that all personal injury and wrongful death actions arising out of the collapse of the skywalks at the Kansas City Hyatt Regency Hotel on July 17, 1981 which are still pending on March 14, 1983 shall be consolidated for trial on the issues of the liability of defendants for actual and punitive damages.

JUDGE TIMOTHY D. O'LEARY
Circuit Court Judge

Kansas City, Missouri
Dated: September 9, 1982